

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

SANTA FE COMMUNITY COLLEGE-
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS,

Petitioner,

vs.

PELRB CASE NO. 311-16

SANTA FE COMMUNITY COLLEGE,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on a Petition by Santa Fe Community College-American Association of University Professors (“SFCC-AAUP”) for certification of election results and appeal of the Hearing Officer’s decision denying the inclusion of chairs and directors under the approved collective bargaining unit.

At its regularly scheduled meeting on April 25, 2017, Director Griego provided the Board with the certified results of the election held on March 29, 2017. The election results established majority support for a non-chair and non-director bargaining unit for SFCC-AAUP professors. Director Griego excluded all challenged ballots submitted by SFCC-AAUP chairs and directors from his computation of the election results. The Board being sufficiently advised finds with a vote of 3-0:

- A. The election results complied with 11.21.2.1 *et seq.* NMRA; and
- B. SFCC-AAUP received majority support by non-chair and non-director professors;

- C. Certification of the bargaining unit should be issued by the Board for non-chair and non-director professors;
- D. The issue on appeal concerning the inclusion of chairs and directors under the SFCC-AAUP bargaining unit is remanded back to Director Griego to determine (1) which chairs and directors do not fall under the statutory definition of "management employee" as defined by NMSA 1978, Section 10-7E-4(O); and (2) whether the chairs and directors who do not fall under the statutory definition of "management employee" share a common interest with the bargaining unit for SFCC-AAUP professors as defined by 11.21.1.7(B)(16) so that they may be added to the bargaining unit as certified.

THEREFORE THE BOARD Orders Director Griego to publish this Order, certify the election for SFCC-AAUP professors and set a hearing on the issues concerning chair and directors.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

5-2-17

DATE



DUFF WESTBROOK, BOARD CHAIR


STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

RESULTS OF SECRET BALLOT ELECTION


EMPLOYER: Santa Fe Community College
LABOR ORGANIZATION: SFCC-AAUP
PELRB CASE NO. 311-16
DATE OF ELECTION: Wednesday, March 29, 2017
LOCATION OF ELECTION Santa Fe Community College
Building 100
Jemez conference room(s)
6401 Richards Ave.
Santa Fe, NM 87508

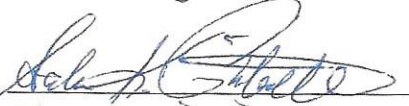
1.	Total Number of Eligible Voters	48
2.	40% of Eligible Voters Equals:	19
3.	Total Ballots Cast	42
4.	Was the 40% Requirement Met?	Yes
5.	Total Number of Votes for SFCC-AAUP	39
6.	Total Number of Votes for "No Representation"	3
7.	Number of Challenged Ballots	14 (dir), + 3 (prob) + 7 (other)
	Challenged Ballots Rejected By Parties	7
	Challenged Ballots Agreed To By Parties	0
8.	Invalid Votes	0

THE ABOVE IS A TRUE STATEMENT OF THE ELECTION RETURNS.

Election Supervisor  Date: March 29, 2017

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulation were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

Observer:  For: SF Community College Date: March 29, 2017

Observer:  For: SFCC-AAUP Date: March 29, 2017
Margaret E. Sch

**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In re:

**SANTA FE COMMUNITY COLLEGE-
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS,**

Petitioner

v.

PELRB No. 311-16

SANTA FE COMMUNITY COLLEGE,

Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego as the designated Hearing Officer for a hearing on composition of the bargaining unit held Tuesday, February 28, 2017 at the PELRB offices, 2929 Coors Blvd. N.W. Suite 303, Albuquerque, New Mexico. This matter concerns SFCC-AAUP's Amended Petition for Certification, wherein SFCC-AAUP seeks to be certified as the exclusive bargaining representative for purposes of collective bargaining all full-time faculty, including faculty with titles of Department Chair and Director, employed by Santa Fe Community College (SFCC or Employer). SFCC contends that those holding the positions of "Chair" and "Director" do not belong in the bargaining unit because (1) they share no community of interest with faculty; (2) are supervisors, NMSA 1978, § 10-7E-4U; and (3), are management employees. NMSA 1978, § 10-7E-4(O). Therefore, the first three issues to be determined are those.

A further dispute exists concerning the scope of employees eligible to vote in the upcoming representation election. The Employer contends that otherwise eligible employees who have not completed SFCC's multi-year probationary periods are not eligible to vote, nor are

“temporary employees” as SFCC defines them. Therefore, I will also determine the scope of eligible voters under the facts of this case.

Pursuant to 11.21.1.22(A) NMAC, neither party has the burden of proof with respect to the contested issues. All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to submit written post-hearing briefs. Both parties’ closing briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following findings and conclusions:

FINDINGS OF FACT:

1. SFCC is a public employer under §10-7E-4(S) of the Public Employee Bargaining Act (PEBA). (Amended Petition; Employer Statement of Issues)
2. The Santa Fe Community College Chapter of the American Association of University Professors, Petitioner herein, is a labor organization under §10-7E-4(L) of the PEBA. (Amended Petition; Employer Statement of Issues).
3. While the Employer has adopted a labor management relations ordinance (adopted in 2005, see PELRB Case No. 208-05), no members have been appointed and it has never convened. (Amended Petition; Employer Statement of Issues)
4. The geographic work location of the petitioned-for unit is the campus of Santa Fe Community College. (Amended Petition; Employer Statement of Issues).
5. As this is a Petition for recognition of a collective bargaining unit that, if successful at its election, will be the first bargaining unit at the Employer, there is no history of collective bargaining relevant to this inquiry. (Statements of counsel; Audio record Part 2 at 3:43:10 – 3:43:42).

6. The Department Chairs and Directors employed by SFCC are on the same compensation system as other faculty and are paid the same salary as other faculty members. A “10.5 month” or a “12 month” Chair or Director earns more salary than those faculty on the more usual nine month contract, but that compensation is consistent with salaries paid other faculty who are on a 10.5 month or 12 month contract and is related to the additional months of service rather than to serving as a Depart Chair or Director. (Testimony of Dawn Wink; Exhibit A).
7. The evidence is ambiguous as to whether Department Chairs and Directors employed by SFCC earn the same employment benefits as other faculty members employed by SFCC because none of the Department Chair or Director witnesses could testify with certainty whether the benefits of other faculty are different than their own. While questions were put to Department Chair and Director Witnesses by counsel for SFCC intimating that there might be a difference in annual leave accrual, there was no clear answer by the witnesses on this point (Testimony of Sahaj Khalsa.)¹ On the other hand Margaret Peters, having held positions as Department Chair, Vice President for Academic Affairs and Vice-President of Student Affairs, testified that Most faculty are “9- month” faculty a few are 10.5 contract and the remainder are on 12 month contract teaching classes or performing ATA duties over the summer period. Of these, the 12 month faulty (whether or not they also serve a Department Chairs or Program Directors) accrue sick and annual leave.
8. Department Chairs routinely supervise two or more adjunct and fulltime faculty.
(Exhibit D.)

¹ Except where it agrees with the Employer’s positions Mr. Khalsa’s testimony is given little weight because he was being prompted with visual cues from the SFCC-AAUP representative at counsel’s table, which was recognized and addressed on the record.

9. Whether fulltime faculty are “supervised” by their Chairs or Program Directors, the Chairs and Directors are supervised by various Deans appointed over them.
(Testimony of Sahaj Khalsa; Testimony of Rebecca Jeffs)
10. Department Chairs and the Program Directors that are at issue in this case are full-time faculty of SFCC and teach classes as other full-time faculty in their respective Departments do. But, while their work hours (except for any “overload” teaching hours paid outside of an employee’s contract) are the same as those worked by other similarly scheduled faculty, Chairs’ and Directors’ classroom hours are offset by “Alternate Time Assignment (ATA)” hours for performing their duties as Chairs and Directors. (Testimony of Margaret Peters; Exhibit B).
11. According to SFCC Policy 3-6, Definitions, subparagraph D (Exhibit A), Chairs and Directors:

“...are full-time faculty members who receive appropriate course release in order to assume managerial duties to support their academic programs and deans. These managerial duties include supervision and evaluation of full time and adjunct faculty; developing class schedules; recommending the hiring of adjunct faculty; budget management; curriculum and program development, addressing concerns and complaints, assessment and review; and oversight of laboratories and equipment. Chair contract periods may include nine month, ten and one-half month, or twelve month [sic] depending on departmental and programmatic needs.”
12. Whether time spent by Chairs and Directors on the ATA “managerial” duties referenced above are less or more than time spent in classroom instruction varies from position to position. (Exhibit B). However, according to Policy 3-6, Workload, subparagraph D those managerial duties are undertaken “...to support their academic programs and deans.” (Exhibit A).

13. All faculty, including Department Chairs and Directors, perform most if not all of their duties at the SFCC campus and are required to maintain office hours on site. (Testimony of Sahaj Khalsa; Testimony of Rebecca Jeffs).
14. While all Department Chairs and Directors may not be *primarily* engaging in management functions compared to their teaching load, some are. For example, Exhibit B illustrates that for three of the six Directors listed a greater percentage of their time involves duties other than teaching. A fourth Director's work load is evenly split between teaching and non-teaching duties. Similarly, eight of twelve Department Chairs are shown on Exhibit B to devote a greater percentage of their time to duties other than teaching. An additional three equally divide their time between teaching and non-teaching duties.
15. Among the various Directors and Chairs the percentage of teaching load varies and while they may not have responsibility for developing management policies they do have responsibility for administering, or effectuating management policies, which requires more than merely participating in cooperative decision making programs on an occasional basis. For example, the Teacher Education Program Director, Dawn Wink, "Directs the organization, administration, coordination, development and evaluation of the college's teacher education program.
16. Directors' exercise of discretionary authority on behalf of SFCC by establishing the program schedule, staffing, and degree requirements (Testimony of Dawn Wink and Rebecca Jeffs; Exhibits B and F2-F7.)
17. While Chairs and Directors typically oversee the work of two or more other employees they do not "customarily and regularly direct" that work. Because a Director's subordinates are professional peers, his or her interaction with them is

described as “collaborative” and very little time is spent directly supervising their work. Professor Khalsa testified that he spent as little as two to three hours per year evaluating subordinate faculty and observing their classrooms. For that reason the weight of the testimony is that a majority of work time by Chairs and Directors is devoted to other than supervisory duties.

(Testimony of Sahaj Khalsa; Testimony of Rebecca Jeffs; Exhibit D.)

18. Department chairs and directors have “the authority in the interest of the employer to recommend such actions effectively hire and discipline adjunct faculty. (Testimony of Margaret Peters; Testimony of Dawn Wink; Exhibit A ¶ I; Exhibit2 “Job Duties: Exhibit G.)
19. That a Director’s or Chair’s Core Faculty Contract is the same as those for other full-time faculty is not dispositive because it pertains only to duties as a Professor or Assistant Professor, without reference to the duties actually performed upon assuming responsibilities as Department Chair or Program Director. (Exhibits 4 and E-1 through E-27).
20. Directors do not routinely write SFCC policies but are responsible for the overall function of their assigned programs by enforcing SFCC policies related to staffing, scheduling and accreditation. Typical duties outside of the classroom, lesson preparation and grading include:
 - a. Class and faculty scheduling;
 - b. Ordering supplies and books;
 - c. Advising students in their programs, including those taught by other faculty;
 - d. Addressing faculty concerns;
 - e. Serving on committees;

- f. Building curriculum;
- g. Interfacing with professional communities relevant to their respective departments;
- h. Managing their Departments' budgets.

(Testimony of Sahaj Khalsa; Testimony of Rebecca Jeffs; Testimony of Dawn Wink; Testimony of Margaret Peters.).

21. At SFCC, a “program” represents a grouping of particular areas of study, for example, the Teacher Education program is designed to educate and train aspiring certified public school teachers. (Testimony of Dawn Wink).
22. Department Chairs creating the department schedule, are responsible for staffing, and class rollout and implement SFCC policies that govern the operation of their departments, including policies that directly affect faculty and staff. For example, Chairs create and implement policies to effectuate hiring, scheduling, and curriculum. (Exhibits B, D, and G and the testimony of Vice-President Margaret Peters and Dr. Steve Martinez.)
23. Full-time faculty report directly to Chairs and Directors, whereas Chairs and Directors report to various Deans. (Testimony of Sahaj Khalsa; Margaret Peters).
24. The express purpose of SFCC Employment of Faculty Policy 4-44 is to provide “... for the right to continued employment for full-time and part-time faculty members that have successfully completed their probationary periods, known as ‘Core Faculty Members.’” (Exhibit 1).
25. According to SFCC Employment of Faculty Policy 4-44 the term “Faculty Probationary Period” refers to:

“...the period of time during which a new faculty member, except an Adjunct Faculty Member, works for the College prior to becoming a Core

Faculty Member. In order to complete the Faculty Probationary Period, the faculty member must successfully complete four consecutive semesters as a faculty member (not including summer semesters). If a faculty member leaves the College or becomes an Adjunct Faculty Member before successfully completing the full four-semester probationary period, the Faculty Probationary Period is restarted, unless such requirement is waived by the President as a result of extenuating circumstances. Successful completion of the Faculty Probationary Period means that the attendance, job performance and conduct of the faculty member during the probationary period have all been satisfactory. At the sole discretion of the President, the Faculty Probationary Period may be extended for up to two additional semesters in the event that the attendance, performance, or conduct of the faculty member requires improvement.”

(Exhibit 1).

26. Despite 11 years of employment with SFCC and three years as a Director, Dawn Wink is considered to be a probationary employee. (Exhibit 1; Testimony of Dawn Wink).
27. Of the employees listed on Exhibit C as “Temporary” and which SFCC claims therefore excludes them from collective bargaining, several have been employed on repetitive contracts for more than one year.

RATIONALE AND CONCLUSIONS OF LAW:

It is not disputed that SFCC is a public employer under §10-7E-4(S) of PEBA and the Union is a labor organization under §10-7E-4(L) of PEBA. While the Employer has adopted a labor/management relations ordinance (adopted in 2005, see PELRB Case No. 208-05), No members have been appointed and it has never convened. Accordingly, and as stipulated in the parties’ Pre-Hearing Order entered February 22, 2017, the Public Employee Labor Relations Board has subject matter jurisdiction to hear this petition and personal jurisdiction over the parties.

I. Department Chairs and Program Directors Employed By SFCC Are Not Supervisors Under NMSA 1978, § 10-7E-4(U).

Legal Standard: PEBA excludes “supervisors” from its coverage. *See* NMSA 1978 §10-7E-4(U). The term “supervisor” for our purposes is a term of art and not every function that the layman may interpret as being supervisory will satisfy the statutory requirement for supervisory status excluding someone from collective bargaining under the Public Employee Bargaining Act (PEBA). On this point the Employer misconstrues the PEBA. The test in *not* whether an employee performs a *substantial* amount of work time performing supervisory duties. That was the former test that passed with the sunset with the first version of the PEBA. With the enactment of NMSA §§ 10-7E-1 *et seq.* (PEBA II) in 2003, a putative supervisor must satisfy the following three-part test: the employee must (1) devote a majority of work time to supervisory duties; (2) customarily and regularly direct the work of two or more other employees; and (3) have authority in the interest of the employer to hire, promote or discipline other employees or to recommend such actions effectively. NMSA §§ 10-7E-4(U). Moreover, even if this initial three-part test is met, the employee is not a supervisor under PEBA if any of the following questions can be answered in the affirmative: (i) the employee performs merely routine, incidental or clerical duties; (ii) the employee only occasionally assumes supervisory or directory roles; (iii) the employee performs duties which are substantially similar to those of his or her subordinates; (iv) the employee performs as merely a lead employee; or, (v) the employee merely participates in peer review or occasional employee evaluation programs. *See* § 4(U).

Analysis: In evaluating whether the Department Chairs and Program Directors meet the statutory definition of a “supervisor” I rely primarily on the testimony of the witnesses as to their actual job duties performed where they vary from employer expectations, job descriptions or standard operating procedure manuals. *See, In re McKinley County Sheriff's Association Fraternal Order of Police & McKinley County*, 1 PELRB No. 15 (Dec. 22, 1995)

(considering actual duties performed rather than written job descriptions or Standard Operating Procedures manuals); *In re Communications Workers of America, Local 7911 & Dona Ana County*, 1 PELRB No. 16 (January 2, 1996) (considering actual duties performed rather than written job descriptions and the employer's expectation that a position would engage in supervision while performing the work of subordinates); *In re: Local 7911, Communications Workers of America & Dona Ana Deputy Sheriffs' Association, Fraternal Order of Police and Dona Ana County*, 1 PELRB No. 19 (August 1, 1996) (rejecting the significance of employer's designation of position as supervisor). In *AFSCME v. N.M. Dept. of Corrections*, D-202-CV-2013-01920, (May 15, 2014), the District Court noted that PEBA's definition of supervisor is a term of art: "Although lieutenants may be 'supervising' in the ordinary sense of the word, 'supervisor' is a term of art with a specific statutory definition that includes more than simply giving direction to subordinate employees." For this determination, the employees' actual job duties, rather than job titles or ranks is controlling. *In re: N.M. Coalition of Public Safety Officers, Local 7911, CWA, AFL-CIO & Town of Bernalillo*, 1-PELRB-21 (1997) ("It is not the rank nomenclature ... that is determinative but rather the facts related to whether the individual functions as a supervisor as defined under the Act."); *N.M. State University Police Officers Association and N.M. State University*, 1-PELRB-13 at 5-6 (job duties, not titles or job descriptions control).

Based on the testimony of the witnesses and review of the job descriptions, contracts and Faculty Policy 4-44, I conclude that while many of the criteria under §4U militate in favor of concluding that Department Chairs and Program Directors are supervisors as that term is

defined in the PEBA,² they do not, in fact, devote a majority of work time to supervisory duties.

While Chairs and Directors typically oversee the work of two or more other employees they do not “customarily and regularly direct” that work. To the extent that they do direct subordinates’ work the amount of their time spent doing so is *de minimus*. A majority of work time by Chairs and Directors is devoted to other than supervisory duties.

Having determined that Department Chairs and Program Directors are not supervisors because they do not spend a majority of their time performing work that is supervisory in nature, I do not further analyze the remaining criteria for supervisory status under §4 (U).

II. Department Chairs and Program Directors Employed by SFCC Are Management Employees Under NMSA 1978, § 10-7E-4(O).

Legal Standard: PEBA’s definition of a “manager” exempt from coverage of the Act can be broken down into a two-part test:

- a. the employee is primarily engaging in executive and management functions; and
- b. he or she has responsibility for developing administering, or effectuating management policies, which requires the employee to do more than merely participate in cooperative decision making programs on an occasional basis.

The first prong of the Act’s test requires that an individual possess and exercise a level of authority and independent judgment sufficient to significantly affect the employer’s purpose.

The second prong requires an employee creates, oversees or coordinates the means and methods for achieving policy objectives and determines the extent to which policy objectives will be achieved. This requirement means more than mechanically directing others in the

² For example, Department Chairs and Program Directors have authority in the interest of the employer to hire, and discipline adjunct professors employed by SFCC or to recommend such actions effectively, usually one of the more difficult supervisory criteria to satisfy. They decide whether to renew the annual contract of those adjunct professors in their respective departments.

name of the employer but rather, requires an employee to have meaningful authority to carry out management policy. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). Noteworthy for purposes of this Decision, PEBA's definition does not require that the employees must create or initiate management policies – rather, they create, oversee or coordinate the means and methods for achieving those policies.

The key inquiry is whether the duties and responsibilities of the alleged management employees are such that these individuals should not be placed in a position requiring them to divide their loyalty between the employer and the union. *NEA & Jemez Valley Public Schools*, 1 PELRB No. 10 (May 19, 1995). “Employees exhibit such authority when they exercise independent judgment to establish policies and procedures, to prepare budgets, or to assure effective and efficient operations. Managerial employees must exercise discretion within, or even independently of established employer policy and must be aligned with management.” *Id.* To meet the second part of the test, the employee must “either create, oversee or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved” which “means more than mechanically directing others in the name of the employer” but instead requires “an employee [to] have meaningful authority to carry out management policy.” *Id.*

Analysis: That Chairs and Directors are “full-time faculty” does not exclude the possibility that the duties they perform in that role meet the criteria of §4 (O), nor does it necessarily mean that their primary duties are in the classroom, teaching as their subordinates do. By reference to Exhibit B we see that it is the exception, rather than the rule, that Chairs and Directors spent 50% or more of their time teaching. The primary duties for the majority of them therefore lie elsewhere. Directors are responsible for the overall function of their assigned programs. At SFCC, a “program” represents a grouping of particular areas of

study, for example Teacher Education is designated as the program designed to educate and train aspiring certified public school teachers. This requires each program offer timely and relevant courses, function in accordance with relevant college policies as well as state and federal law, and meet its accreditation requirements. In order to meet SFCC's mission and purpose, it employs Directors with the explicit expectation that Directors maintain the overall responsibility for the viability and continued existence of their program by developing, instituting and enforcing policies related to staffing, scheduling, accreditation. Therefore, SFCC's mission is directly and negatively impacted if programs fail.

Directors implement SFCC policies that govern the operation of their program, including policies that directly affect faculty and staff such as those with respect to hiring, discipline, and scheduling. The Directors have full and broad discretion to implement policies, schedules, hiring decisions, clinical partnerships, etc. in ensuring the operation and continued accreditation of their programs. Directors, daily exercise discretion within, and independently of, SFCC policy, and create, oversee, or coordinate the means and methods for achieving policy objectives and determine the extent to which policy objectives will be achieved. (Testimony of Dawn Wink and Rebecca Jeffs; Exhibits F2-F7 and B). The evidence shows that Directors are immediately and independently responsible for ensuring their programs remain viable within the structure of SFCC.

Similarly, Chairs are responsible for the overall function of their assigned departments. The efficient operation of a particular department is fundamental to SFCC's purpose. This requires the Chairs to ensure proper staffing, class and instructor scheduling, appropriate facilities and supplies. Beyond that, Department Chairs are also responsible for ordering their Department's supplies and books, advising students in their programs, including those taught by other faculty, addressing faculty concerns within their departments, representing

their departments and the SFCC on committees before the professional community and other educational institutions, building curriculum; and managing their Departments' budgets.

Because Chairs are responsible for enforcing policies, and full-time faculty are responsible for complying with those policies, I conclude that including Chairs in the bargaining unit would necessarily require them to divide their loyalty between SFCC and the SFCC-AAUP, thereby rendering the unit inappropriate.

III. Because I Have Determined That Directors And Chairs Are Excluded From Collective Bargaining Because They Are Managers, I Do Not Analyze SFCC's Argument That They Do Not Share A Community Of Interest With Full-Time Faculty.

IV. Probationary Employees Excluded From The Bargaining Unit Are Those Who Meet The Definition For Non-State Employees Who May Not Be Considered To Be A Probationary Employee For More Than One Year After The Date He Or She Is Hired By SFCC.

Legal Standard: SFCC correctly points out in its closing brief 11.21.1.7 B(9) NMAC, defines the term "probationary employee" for purposes of determining inclusion in a bargaining unit as follows:

"Probationary employee' for state employees shall have the meaning set forth in the State Personnel Act and accompanying regulations; for other public employees, other than public school employees, it shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for non-state employees a public employee may not be considered to be a probationary employee for more than one (1) year after the date he or she is hired by a public employer. If otherwise undefined, the term shall refer to an employee who has held his or her position, or a related position, for less than six months."

Analysis: 11.21.1.7 B(9) NMAC (2005) contains no explicit reference to community college faculty. But in the absence of an explicit deference to the State Personnel Act or other applicable "ordinance, charter or resolution" the probation period may be as short as six month but in no event may exceed one year. SFCC argues that its somewhat longer

probation period set forth in its policy 44-4 should apply here. However, this Board has held that an employer's designation of an employee as "probationary" will not necessarily be dispositive, and the hearing examiner may look to the background facts and the policy underlying the regulatory definition of "probationary" in making the determination of unit inclusion or exclusion. For example, in one case, an employee was held not to be probationary under UNM personnel regulations where she had worked in the same position doing the same job for almost a year, for six months as a temporary employee and five months as a regular employee; and where the stated purpose of probationary status was to "give the University the opportunity to evaluate" a new employee's performance and to allow the new employee "the opportunity to understand the mission and goals of the University and ... department and to demonstrate satisfactory performance." *See United Staff-UNM Employees Local No. 6155 v. UNM*, PELRB Case No. 101-05, Hearing Examiner Report at 11-13, 32-34 (Aug. 17, 2005).

Applying that rationale, it is appropriate to conclude that 11.21.1.7 B(9) NMAC should be construed to mean that for purposes of determining who may be included in the collective bargaining unit at issue no one employed for more than one year after the date he or she was hired by SFCC should be excluded on the basis of being a probationary employee. There is no conflict between this construction of 11.21.1.7 B(9) NMAC and the Community College Act, NMSA 1978, §§ 21-13-1 to -26 (which provides the SFCC Board with authority to determine how a probationary employee is defined with respect to community college faculty.) SFCC remains free to apply the Community College Act to all areas of faculty life except that over which this Board has exclusive jurisdiction – that of determining the propriety of bargaining units. This construction is consistent with the long-standing policy of this Board that PEBA is to be interpreted to effectuate the purpose of ensuring all covered

public employees are afforded collective bargaining rights. *See, e.g., Regents of the University of New Mexico v. New Mexico Federation of Teachers*, 125 NM 401. (1998).

To accept SFCC's interpretation of probationary status' effect on bargaining rights would result in an injustice. For example, despite 11 years of employment with SFCC and three years as a Director, Dawn Wink would still be considered a probationary employee and therefore excluded from collective bargaining. I remind the reader that under labor law precedent the unit need only be "an appropriate bargaining unit," not necessarily the "most" appropriate bargaining unit. *See NEA-Belen, supra; See also American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). Additionally, an appropriate unit is identified by the PELRB from within the petitioned-for grouping. *See NEA-Belen, supra, and Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (in challenging a petitioned-for unit "the employer must do more than show there is another appropriate unit," and instead must show that unit is "truly inappropriate") (citations omitted). However, under NLRB decisions, a bargaining unit consensually agreed to by the parties will generally be accepted as lawful unless wholly inappropriate. *See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW* (6th Ed.) at 1451-1457.

V. Temporary Employees Do Not Share A Community of Interest With Full-Time Faculty.

SFCC-AAUP's Amended Petition seeks to include "all full-time personnel at Santa Fe Community College classified as faculty with less than 50% direct supervisory duties, including faculty with title Department Chair and Director." The Petition specifically excludes, "all part-time faculty members and all personnel classified as staff, including Directors without instructional duties, and all ranks above Department Chair." Because, per SFCC Policy and via employment contracts, Temporary Employees do not share the expectation of employment shared by regular full-time faculty, there is no community of

interest between the two categories of employee.³ Therefore, temporary employees are excluded from the bargaining unit as proposed for lack of a shared community of interest. This conclusion is in accord with my understanding of the treatment of temporary and part time faculty positions in other two-year and four-year institutions engaged in collective bargaining in New Mexico.

RECOMMENDED DECISION:

The Chairs and Department Directors meet the statutory definition of managers and are excluded from the bargaining unit pursuant to §§ 10-7E-4(O) and 10-7E-5. Probationary Employees to be excluded from the Bargaining Unit are those who have not been employed for more than one year after the date he or she is hired by SFCC in an otherwise covered position. The Bargaining Unit Shall not include part-time or temporary faculty. The parties shall post Notice of the scheduled election adjusted to reflect this description of the bargaining unit and proceed with the election as scheduled.

APPEAL: Either party may appeal this hearing officer's decision by filing a notice appeal with the PELRB staff at 2929 Coors Blvd. NW in Albuquerque New Mexico 87120. Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.1.

³ Community of interest shall be analyzed under the nine factors listed in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962), although no single community of interest factor shall be conclusive. Community of interest factors under *Kalamazoo* include: (1) differences in method of wages or compensation; (2) differences in work hours; (3) differences in employment benefits; (4) separate supervision; (5) degree of dissimilar qualifications, training and skills; (6) differences in job functions and amount of working time spent away from the employment or plant *situs*; (7) the infrequency or lack of contact with other employees; (8) the lack of integration with the work functions of other employees, or interchange with them; and (9) the history of collective bargaining.

Issued this 11th day of March, 2017



Thomas J. Griego
Designated Hearing Officer
Public Employee Labor Relations Board
2929 Coors N.W., Suite 303
Albuquerque, NM 87120